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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

vs.

No. 1:18-CR-3495-JCH

DOUGLAS SMITH

TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING

March 16, 2021

BEFORE: HONORABLE JUDGE JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype.

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15 I N D E X

16 PAGE:

17 Certificate of Reporter

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1 THE COURT: Good morning everyone.

2 We are on the record in USA versus Smith,
3 Case Number CR-18-3495.

4 Can I have appearances, please, for the
5 record.

6 MR. NAYBACK: Thank you, Your Honor.

7 The United States by Kyle Nayback and
8 Novaline Wilson.

9 Ms. Wilson is in the same room with me and
10 will be arguing the 911 issue and I will be handling
11 the rest of the matter.

12 Thank you.

13 MR. ELSENHEIMER: Good morning, Your
14 Honor. Aric Elsenheimer on behalf of Mr. Douglas
15 Smith. Mr. Smith is in the room with us here. We
16 are at the Federal Public Defender's Office. I am
17 joined by my colleague, Dan Burt.

18 Your Honor, if it is all right with you,
19 Mr. Smith is just going to kind of sit over in the
20 corner just so we can be a little bit distant. He
21 will be off screen, but I just wanted to let you
22 know that.

23 THE COURT: All right. That is fine. As
24 long as he is able to see and hear the proceedings,
25 that is fine.

1 We are here today to take up some of the
2 evidentiary issues.

3 Mr. Nayback, are you ready to proceed with
4 the Government's exhibits? So basically the
5 United States filed the motion in limine regarding
6 certain exhibits and the Government has moved to
7 exclude certain self-serving inadmissible hearsay
8 and irrelevant prejudicial statements. And also
9 filed its notice of intent to offer recorded
10 statements in its case-in-chief.

11 So are you ready to proceed on that?

12 MR. NAYBACK: Yes, Your Honor.

13 Thank you so much.

14 MR. ELSENHEIMER: Your Honor, may I first
15 just clarify something that Your Honor pointed out
16 in the memorandum opinion and order?

17 THE COURT: Sure.

18 MR. ELSENHEIMER: You had highlighted that
19 there was a discrepancy between what we highlighted
20 and our prior objections and you are absolutely
21 correct. I apologize for that.

22 I don't know if there was a coding issue
23 or if we just missed it, but with regard to Items 4,
24 5, and 6, and this is on Page 16 and 17 of
25 Document 141, that is the memorandum opinion and

1 order. Those four items, we do not withdraw
2 objections to those. And again, I apologize that
3 our highlighting was unclear on that point but we do
4 not withdraw our objections.

5 THE COURT: All right. Understood. Thank
6 you.

7 Mr. Nayback, you may proceed.

8 MR. NAYBACK: I really have an interest in
9 streamlining this for the Court.

10 THE COURT: Yes.

11 MR. NAYBACK: I appreciated defense's
12 response and I was going to go off that this
13 morning, if the Court intends to follow along.
14 Because I think he does a good job of highlighting
15 where the disputes are and I just wanted to address
16 those with the Court.

17 And so, however, obviously we will take
18 the Court's direction on what you would like
19 information on but I was going to go to the first
20 blue, highlighted in blue statement, which is --

21 THE COURT: I have no colors, so you will
22 have to be a little bit more precise.

23 MR. NAYBACK: Thank you, Your Honor.

24 I am looking at the interview first,
25 Your Honor, if you have the statements in front of

1 you, the May 5th statement in the arrest of Douglas
2 Smith, Defendant's Exhibit A.

3 THE COURT: I have that.

4 MS. WILSON: Okay. So I am going to go,
5 so let's see, I will give you a page number and a
6 line number. The first blue highlighted portion --
7 I'm sorry, I won't reference the colors anymore but
8 the statement that's in dispute on Page 8.

9 There is a bunch of page numbers. Page 8,
10 Line 6 through 9. Now the statement that the
11 United States wants to admit is simply that
12 Mr. Smith stated that he came out back here with a
13 pistol. We believe that it is an exculpatory
14 statement. And this is raised several times where
15 he claims that, "I thought it was raccoons and I was
16 going to chase them off."

17 And then says without a transition,
18 "Someone trying to break into the little trailer
19 there."

20 This comes up a number of times and I
21 don't want to repeat myself each time, but we think
22 both the fact that he says he thought it was
23 raccoons and that someone was trying to break into
24 the trailer they are exculpatory statements that
25 ought to be deemed inadmissible by the Court. The

1 reason we say that is because there is no evidence,
2 as the Court probably knows, the victim was found
3 with no burglary tools on her whatsoever and it is
4 not corroborated by anyone that she was trying to
5 break into the little trailer nor does the
6 United States believe that there is any damage to
7 the trailer handle.

8 And it is also contradictory to
9 Mr. Smith's other statement that she was facing his
10 direction.

11 So for those reasons we think lines --
12 other than the word "pistol," Line 7 through 9
13 should be inadmissible.

14 THE COURT: All right. It probably would
15 be most useful to hear from you, then,
16 Mr. Elsenheimer, that way we don't have to come back
17 to several issues all at the same time. Let's just
18 take them one at a time.

19 MR. ELSENHEIMER: Absolutely, that makes
20 perfect sense.

21 Our response is, as we set out on Page 8
22 in the margin, we believe that under the Rule of
23 Completeness, Lines 7 through 9, obviously not
24 including the word "pistol," but Lines 7 through 9
25 should be included under the Rule of Completeness.

1 First of all, the most important salient
2 factor is that without those three lines Mr. Smith's
3 subsequent reference to the shadow in Line 16 is --
4 it just kind of jumps out of nowhere, whereas if it
5 is taken in the context of those three lines added,
6 it is that he sees somebody breaking into the
7 trailer, that shadow then turns around towards him.

8 So, Mr. Nayback, I respectfully disagree
9 with his characterization of what Mr. Smith has
10 consistently said that he saw which is he saw
11 someone breaking into the tailer. Maybe not having
12 burglary tools, that is something they can certainly
13 bring out in their case-in-chief. But Mr. Smith
14 believed he saw somebody breaking into the tailer
15 and then that shadow turned around towards him.

16 Without those three lines, Lines 7 through
17 9 it is disjointed to then have Mr. Smith reference
18 a shadow because that shadow comes out of nowhere.
19 We don't know where the shadow turned around from,
20 but he says specifically in what the Government is
21 trying to introduce is that the shadow turns around.
22 Well, the prior Lines 7 through 9 provide context
23 for that. And without those lines, it is left, it
24 is unfair to Mr. Smith to just incorp- -- to include
25 Lines 6 and 7 and then 16, 17, and 18 without the

1 contextural framing of Lines 7 through 9.

2 I also, just for the record, want to state
3 that we also believe that it is an excited
4 utterance. I understand that Your Honor has ruled
5 against us on that point, but I just want to state
6 that for the record.

7 THE COURT: Thank you, Mr. Elsenheimer.
8 Anything further on that issue?

9 MR. ELSENHEIMER: Not on those issues.

10 THE COURT: All right. Mr. Nayback?

11 MR. NAYBACK: Just briefly, Your Honor.

12 On the statements we are talking about now, it seems
13 to me that the jury is going to be absolutely clear
14 that this case is about someone who was killed,
15 someone who was on Mr. Smith's property.

16 I don't think it matters and I think it's
17 exculpatory still that Mr. Smith thought it was
18 raccoons and that someone was trying to break into
19 the little trailer.

20 We also understand the Court's ruling that
21 it does not appear to the Court that there is going
22 to be defense of a violent felony here, so we think
23 that Mr. Smith is laying this as a defense that
24 someone was on his property committing crimes. We
25 think that is exculpatory and therefore

1 inadmissible.

2 Thank you. That is all.

3 THE COURT: All right. Thank you. I will
4 turn next to the next issue, Mr. Nayback.

5 MR. NAYBACK: Thank you, Your Honor.

6 So I am going to turn to Page 11 and this
7 is down towards the bottom, Lines 23 through 25. It
8 is the same issue, Your Honor, that Mr. Smith claims
9 that Jane Doe was trying to break into the trailer.

10 And I have to say I appreciated
11 Mr. Elsenheimer's response, especially the
12 annotations along the side, and the United States is
13 prepared to concede this issue. We are going to do
14 it in a number of circumstances, both for you and
15 your law clerk.

16 We do think that when two officers are
17 talking to each other about what Mr. Smith said,
18 that that is most likely hearsay and inadmissible,
19 as Mr. Elsenheimer pointed out. Mr. Elsenheimer has
20 convinced me of his ways in the past, so we would
21 agree that we do not intend to introduce two
22 officers talking to each other, only when they are
23 talking to Mr. Smith.

24 Thank you.

25 THE COURT: All right. So, then 23,

1 Lines 23 through 25 on Page 11 will not be offered.

2 Next?

3 MR. NAYBACK: Yes, Your Honor. Page 12,
4 just the next page, Your Honor. The part that
5 defense is arguing, and he is talking to Mr. Smith
6 here. "So you didn't run after her, because I
7 thought that is what I heard you said, I just want
8 to confirm that."

9 And we didn't, the United States didn't
10 believe that was admissible. It is somewhat
11 exculpatory, we think, and we don't actually know
12 what happened. It is simply Mr. Smith saying that
13 he didn't run after her and we think those should be
14 excluded as being admissible.

15 I do want to -- so that's all I have. It
16 is from lines -- what is in front of the Court is
17 Line 25 on Page 12 to Line 10 on Page 13.

18 THE COURT: All right.

19 Mr. Elsenheimer?

20 MR. ELSENHEIMER: Your Honor, I don't have
21 anything to significantly add in addition to what is
22 already in the margins. And just to summarize that,
23 essentially our concern is that under the Rule of
24 Completeness that should be essentially Lines 25 on
25 Page 12 through Line 10 on Page 13 should be

1 introduced because without it, it makes it, it
2 doesn't appear as though Mr. Smith fully answered
3 Officer Rael's questions, and that could be
4 construed as evasiveness.

5 He did answer the question and answer the
6 follow-up question Officer Rael had for him and
7 clarified exactly what happened.

8 Cutting Mr. Smith's statement off at
9 Line 24 doesn't give his full response to
10 Officer Rael's question and runs, and I think
11 significantly risks that the jury will think that
12 Mr. Smith was being evasive and that will prejudice
13 Mr. Smith in this defense. I think there are
14 significant due process problems with that, excising
15 the statement at Line 24 and it also deprives
16 Mr. Smith of his right to a jury trial.

17 THE COURT: Anything further, Mr. Nayback?

18 MR. NAYBACK: Yes, Your Honor. The
19 United States does not intend to introduce
20 Officer Rael's question and answer in Lines 16
21 through 19, and that is what the jury should be left
22 with, where Officer Rael says -- well, I guess --
23 yeah. "Douglas, okay. One last thing I forgot to
24 ask you. Where exactly were you standing when you
25 were shooting on the back porch."

1 That is what the United States intends to
2 introduce. We do not intend to introduce Lines 20
3 through 25 and on Page 13, Lines 1 through 10.

4 THE COURT: Anything else,
5 Mr. Elsenheimer?

6 MR. ELSENHEIMER: No, Your Honor.

7 THE COURT: Hold on one second.
8 Next?

9 MR. NAYBACK: Page 15, Your Honor, of the
10 same interview.

11 THE COURT: You said Page 15?

12 MR. NAYBACK: I did. Line 11 through
13 Line 15 is in dispute as to whether it is
14 admissible.

15 And without reading it off, I want to,
16 again, concede that statements between Officer Rael
17 and Officer Saucedo and an unknown officer is not
18 something that -- well, we do think it is hearsay
19 and not something that the United States intends to
20 introduce.

21 There is another area on that same page,
22 Your Honor, I want to highlight for the Court. That
23 is the same page, Page 15, Lines 23 and 24 where
24 Officer Rael is talking to Officer Harwell and he is
25 just reiterating what the defendant said, which was,

1 "He said that she was trying to break in."

2 We think that is inadmissible as well. We
3 do not intend to introduce that.

4 THE COURT: All right.

5 Next?

6 MR. NAYBACK: Page 18, Line 23 through 25.

7 THE COURT: All right.

8 MR. NAYBACK: We are going to concede that
9 these are hearsay, two officers talking between each
10 other and we do not intend to introduce those.

11 THE COURT: Okay.

12 Next?

13 MR. NAYBACK: Page 23, Your Honor,
14 Lines 12 through 14 are at issue along with Line 19.
15 The statement is, "They installed motion sensors
16 since they have been having issues with burglaries."

17 And 19 it says, "But he thought he was
18 missing."

19 Again, we think those statements are
20 exculpatory statements brought up by the defendant
21 himself and we do not intend to introduce those.
22 And we would concede the defendant's objection that
23 statements by Officer Rael are hearsay.

24 THE COURT: Okay.

25 Next?

1 MR. NAYBACK: Page 26, Your Honor,
2 Lines 15 and 16. The specific phrase is, "And he
3 didn't think he was actually hitting the shadow."

4 We would concede the objection that they
5 are hearsay and the United States does not intend to
6 introduce that phrase.

7 THE COURT: Okay.

8 Next?

9 MR. NAYBACK: Your Honor, that completes
10 just for the record, the arrest of Douglas Smith
11 May 5th, 2018 interview.

12 Now I am going to turn to
13 Defendant's Exhibit B.

14 MR. ELSENHEIMER: Can I ask a clarifying
15 question, Your Honor?

16 THE COURT: Yes.

17 MR. ELSENHEIMER: Did the Government
18 address the highlighted section on Page 24?

19 THE COURT: I don't think we heard
20 anything about Page 24.

21 MR. NAYBACK: My apologies.

22 MR. ELSENHEIMER: It is Page 24, Line 19
23 and then on to Page 25, Line 2. I assume --

24 MR. NAYBACK: My apologies. Page 24,
25 Your Honor, had a different color of highlighting.

1 I know you don't have colors on yours, but I didn't
2 see it as an issue. But there is a statement by
3 Officer Rael, once again on Line 19 through 25 and
4 then continuing over on to Page 25, Lines 1 and 2.

5 And the line is, "Yeah, so it looks like
6 just a single shot to the head. The only thing I
7 found kind of odd is there was no blood trail or
8 anything from the trailer to where she is now. That
9 is like the sum total of all the blood I could find
10 so far. But he said he fired off his back porch and
11 we found a few casings there. There is like two or
12 three and there is also an earring. We don't know
13 if it was hers or not."

14 We don't intend to introduce that
15 statement, Your Honor. That is again two officers
16 talking to each other.

17 THE COURT: All right.

18 MR. NAYBACK: And then that, I think, I'll
19 stand corrected if Mr. Elsenheimer has something
20 else, but that completes the May 5th, 2018 arrest of
21 Douglas Smith interview.

22 THE COURT: All right.

23 MR. NAYBACK: The next document is, let me
24 make sure this is not the same.

25 Defense Exhibit B, also an May 5th

1 interview of Doug Smith. And the first issue in
2 dispute is on Page 8, Line 16 through 25.

3 THE COURT: I'm sorry, one more time.

4 MR. NAYBACK: Yes, Your Honor. Page 8, 16
5 through 25. So this long sentence is again talking
6 about break-ins. The United States, you know, we
7 are not sure how a jury might take any of these
8 statements, but we view these as exculpatory
9 statements, Mr. Smith trying to lay a defense that
10 there was other break-ins, he was scared, that type
11 of thing.

12 And we don't think these are admissible as
13 statements by the defendant because they are
14 exculpatory.

15 Thank you.

16 THE COURT: Thank you.

17 Mr. Elsenheimer?

18 MR. ELSENHEIMER: Your Honor, just to
19 reiterate, I believe that this statement provides,
20 under the Rule of Completeness, provides context for
21 the subsequent statements that the Government is
22 seeking to introduce through Mr. Smith.

23 Simply cutting Mr. Smith's statements in a
24 piecemeal fashion significantly prejudices him and
25 leaves the jury with an inaccurate view of what he

1 actually said. And more than just an inaccurate
2 view, it risks mischaracter- -- allowing the
3 statements that the Government is seeking to
4 introduce, allows those statements to be
5 mischaracterized by the absence of the surrounding
6 discussion and explanation and answer to
7 Detective Abeyta's questions.

8 So we believe that the -- with regard to
9 the statement on Page 8, going on to Page 9, that
10 should be introduced under the Rule of Completeness.
11 Again, for the record, I also believe that it falls
12 within the excited utterance exception to the
13 hearsay rule, but I know Your Honor has ruled on
14 that.

15 But we believe that under the Rule of
16 Completeness that should come in because it, without
17 it, the jury is left with an inaccurate view of what
18 Mr. Smith said. And under the Rule of Completeness
19 it is really looking at what statements provide
20 context for the statements the Government is seeking
21 to introduce.

22 We are not, again, trying to get the
23 entire statement in but we believe that it is those
24 statements that provide context and explanatory
25 parameters for Mr. Smith's subsequent statements

1 should be introduced. And this statement going from
2 Line 16 on Page 8 to Line 1 on Page 9 is one of
3 those statements.

4 THE COURT: All right. Got it.

5 Anything further, Mr. Nayback?

6 MR. NAYBACK: Only that we just don't
7 think the fact that he has had break-ins in the past
8 that he, in fact, has, that those don't put his
9 statement into any greater context than it might be
10 without that statement.

11 And then, secondly, I don't think the fact
12 that the defendant had to put in motion detectors
13 gives his statement any more context for the jury.

14 Recall that the defendant claims he
15 thought they were raccoons. The story, as presented
16 by the United States, can start with Mr. Smith on
17 the back porch seeing, seeing a shadow, as he put
18 it. It doesn't matter how he got outside or what
19 his motion sensors picked up or whether he had
20 break-ins in the past. We think the -- and those
21 haven't been proven up, Your Honor, by -- the
22 United States doesn't intend to introduce the
23 break-ins, but that clearly is Mr. Smith trying to
24 give his motivation for going out armed and then
25 firing was because he had break-ins in the past. We

1 think those are exculpatory statements and
2 excludable.

3 Thank you.

4 THE COURT: Next?

5 MR. NAYBACK: Is on Page 9, Your Honor,
6 just the following page. And what is at issue are
7 portions of Line 21 through 25. And I will read the
8 defense objections to the relevant portion.

9 "So I thought, well, there is like three,
10 or four raccoons out there. So I just -- I used to
11 wander around and then I ran into a couple of guys
12 in the middle of the night and all I had" -- I'm
13 sorry, I'm going on to the next page, Your Honor, so
14 it is going on to Page 9 now.

15 "And all I had on were these floppy tennis
16 shoes and just this jacket. I was sleeping with
17 nothing on at the time, and it kind of scared the
18 crap out of me. So I have been kind of panicky
19 about anybody."

20 We don't think these are statements
21 against interest, rather, we think those are
22 exculpatory evidence and ought to be excluded by the
23 Court.

24 Thank you.

25 THE COURT: Mr. Elsenheimer?

1 MR. ELSENHEIMER: Your Honor, so as with
2 the -- so just to be clear, so Mr. Nayback with
3 regard to the prior statement on Page 8 going on to
4 Page 9 and even with regard to that, those kind of
5 set the statements, Page 24. So let me just, I'm
6 sorry, let me back up.

7 With regard to the statements on Page 8
8 going on to Page 9, Mr. Nayback may be correct and
9 that is not the hill I want to have this fight on.

10 Those statements in terms of the Rule of
11 Completeness are, I think they should be brought in
12 under the Rule of Completeness, they are not
13 critical.

14 I believe once we get into the statements
15 where the Government is parsing sentences and then
16 even down to the -- not just sentences, clauses that
17 Mr. Smith is stating, I think that is where we get
18 into the critical analysis under the Rule of
19 Completeness. I just can't see how the jury can be
20 introduced into Sentence 1 and then we -- so like
21 Sentence 1 being Lines 20 through 21, while half of
22 that sentence is excised and then moving on and we
23 excise the sentence that starts on Line 24 going
24 into the next page and then the following sentence.

25 I think once we get down to that type of

1 glandular editing of Mr. Smith's statements, it is
2 impossible for the jury to have an accurate
3 impression and an accurate sense of what he is
4 saying and an accurate context of how he is
5 explaining to Detective Abeyta what happened on that
6 evening. I think those, that is the critical
7 analysis under the Rule of Completeness.

8 Mr. Nayback might be right with regard to
9 the four prior burglaries that Mr. Smith said on
10 Page 8. Again, that is not the hill that I think
11 the fight about the Rule of Completeness that I want
12 to have that argument on. But when we get to the
13 glandular editing of Mr. Smith's statements, that is
14 critical because it deprives the jury of an accurate
15 sense of what Mr. Smith was explaining to
16 Detective Abeyta.

17 And I think, again, I want to incorporate
18 by reference my analysis in the margins, the
19 reference to *Rainey v. Beech Aircraft*, I think,
20 explains how the Rule of Completeness operates in
21 this context. I think that *Rainey* is an excellent
22 case to show that context is critical.

23 So if we are excising clauses in a
24 sentence and sentences within larger explanatory
25 paragraphs, the jury cannot possibly have an

1 accurate assessment of what Mr. Smith says.

2 The idea that these are, some statements
3 are exculpatory and some are somehow not, I don't
4 know that that even has any analytical relevance at
5 this point because how does somebody in Mr. Smith's
6 shoes, as he is interviewing with Detective Abeyta,
7 kind of make some exculpatory statements and some
8 not? I just don't think that it is, just psychology
9 doesn't allow that type of glandular parsing of
10 one's defenses from one's explanation of what
11 happened. And if that can't happen in realtime, I
12 don't think that we should deprive the jury of the
13 ability to see what Mr. Smith was saying in response
14 to Detective Abeyta's questions so that the jury
15 gets an accurate sense of what Mr. Smith said.

16 The big problem is that without those,
17 those isolated sentences or clauses that the
18 Government wants to exclude and, Your Honor,
19 particularly Mr. Nayback hasn't gotten to this, but
20 I may as well just mention it now because I don't
21 want to repeat myself. When we get down to things
22 like, "I got scared witless in Line 12," and I am
23 sure Mr. Nayback will address this. I don't want to
24 jump ahead, but then we get a real problem where the
25 jury is not given an accurate, not given the

1 accurate statement of what Mr. Smith experienced at
2 the time this incident occurred.

3 And that is critical particularly in a
4 case like this where the facts really are not
5 largely in dispute. What we are really talking
6 about is what was Mr. Smith's mental state at the
7 time and was it a culpable mental state or was it a
8 non-culpable. That is the real critical question
9 here.

10 And if the jury is left with an edited
11 version of what Mr. Smith said, he is going to be
12 deprived of his right to a fair jury trial because
13 they won't have an adequate explanation or an
14 adequate picture into what he actually said to
15 Detective Abeyta in the hours following this
16 incident. And that's a significant depravation of
17 Mr. Smith's right to a jury trial and a significant
18 depravation of his right to due process.

19 THE COURT: I understand your point. Tell
20 me if you are -- if you are still asking for the
21 inclusion of specific phrases here.

22 MR. ELSENHEIMER: Yes.

23 THE COURT: So the bottom of Page 9, for
24 example, Mr. Nayback argues that certain things are
25 exculpatory and I wasn't real sure whether you were

1 saying he might be right or whether you were saying
2 he may be right, but they should come in anyway.

3 MR. ELSENHEIMER: I was referring to
4 Page 8 with regard to the four prior burglaries and
5 the motion detectors, putting up the motion
6 detectors.

7 THE COURT: Right, right.

8 MR. ELSENHEIMER: I do not think that with
9 regard to the statements starting at Line 20.

10 THE COURT: Okay.

11 MR. ELSENHEIMER: So Lines 21 through 22,
12 that certainly should come in and then likewise,
13 Line 24 through Line 5 on Page 10. Those should all
14 come in.

15 Again, I want to be clear that I was
16 talking about Page 8. I'm sorry for the confusion,
17 Your Honor.

18 THE COURT: Well, I just wanted to make
19 sure I understood which ones you were -- I
20 understand your argument about parsing out phrases
21 and altering what might be the defendant's mental
22 state. I understand your argument, I just want to
23 make sure I am following exactly which phrases or
24 which parsing you are referring to. So that is what
25 I am trying to accomplish.

1 MR. ELSENHEIMER: Thank you.

2 THE COURT: Okay. So 9 you say that all
3 should come in. The Page 10, same?

4 MR. ELSENHEIMER: The same, Your Honor,
5 yes.

6 THE COURT: Okay. Understood. Thank you
7 for helping me clarify that.

8 Mr. Nayback anything further on Pages 9
9 and 10?

10 MR. NAYBACK: Well, just a point of
11 clarification, Your Honor, if you'll indulge me.

12 After the Court rules on admissibility or
13 inadmissibility of certain statements, the U.S.
14 obviously intends to evaluate the Court's order and
15 may choose not to play certain statements that the
16 Court ruled were admissible.

17 I want to make clear on the record that it
18 is the United States' prerogative to admit or not to
19 admit certain statements by the defendant.

20 The defendant cannot introduce these
21 statements or cross witnesses on statements that the
22 Court ruled were admissible if the U.S. decides not
23 to introduce them. I hope that question was clear,
24 but what I am saying is the Court might rule
25 something --

1 THE COURT: I was just going to say what
2 you're saying if I rule something is admissible that
3 you may still decide not to offer it?

4 MR. NAYBACK: Yes.

5 THE COURT: And if you decide not to offer
6 it, even though the Court may have ruled that it was
7 admissible, I think I heard you say that the
8 defendant should not offer those statements.

9 Did I hear your correctly?

10 MR. NAYBACK: I think under 801(b)(2), it
11 has to be admission by a party opponent and I just
12 wanted to make clear, this seems like axiomatic for
13 me and Ms. Wilson, but I just wanted to be clear
14 that even if a Court ruled that something were
15 admissible, the United States can decline to
16 introduce it in its case-in-chief.

17 THE COURT: Right. I think that's an
18 accurate statement. You don't have to introduce
19 evidence even if it may be admissible.

20 MR. NAYBACK: Thank you, Your Honor.

21 The next issue that was raised by the
22 defense was Page 15 of the same interview, the
23 May 5th, 2018 interview of Mr. Smith.

24 It is at the bottom of the page, 15, and
25 it starts on Line 21. The statement that is in

1 dispute is where Mr. Smith says, "I thought she was
2 already gone, but I was scared witless and I just --
3 I don't know how many rounds I shot, four, five,
4 altogether, I don't know."

5 We think those are exculpatory statements
6 that should not be admissible. I apologize, Your
7 Honor, for completeness, it goes on to Page 16,
8 Lines 1 through 8. Those are something that the
9 United States and the defense dispute. And the
10 United States would ask for a ruling that those are
11 inadmissible as exculpatory statements.

12 Thank you.

13 MR. ELSENHIMER: Your Honor, I can't make
14 an argument about Rule of Completeness with regard
15 to those statements. You've already ruled on the
16 excited utterance. We would reassert that it is an
17 excited utterance, but I understand your ruling.

18 Just to be clear, we are talking Page 14,
19 Line 22 through Page 15, Line 7; is that right?

20 THE COURT: I had us at Page 15, Line 21
21 to Page 16, Lines 1 through 8.

22 MR. ELSENHIMER: I'm sorry.

23 MR. NAYBACK: That is what I was arguing.

24 THE COURT: Page 15, Line 21 through
25 Line 25 and it is Line 21 beginning with, "I

1 thought," and then on to the next page, 16, Lines 1
2 through 8.

3 MR. ELSENHEIMER: Okay. Let me withdraw
4 what I just said. I apologize for that. I was
5 referring to the prior statement on the prior page.

6 With regard to Page 15 starting at
7 Line 20, again, first I think that that falls under
8 the excited utterance exception and the residual
9 exception, but the Court has already ruled on that
10 and I just state it for the record.

11 And I believe the Government is seeking,
12 "She started running and ran behind the bushes and
13 then I couldn't see."

14 I think the next statement should come in
15 because it provides Mr. Smith's full response to
16 Detective Abeyta's question, "And then what happened
17 after?"

18 I don't think that we can cut off the
19 statement after the first sentence. I think under
20 the Rule of Completeness that second -- that second
21 sentence has to come in, the second and third
22 sentence.

23 And further the lines starting Line 25 on
24 Page 15 going on to Line 8 on Page 16 also comes in
25 under the Rule of Completeness for the reasons that

1 I set out in the margin. And again it is a
2 reference to *Rainey v. Beech Aircraft*. I believe
3 that fundamental fairness demands that that entire
4 statement come in, particularly if we are then
5 seeking to introduce the Government is seeking to
6 introduce Line 9, which I believe they are going on
7 to Line 25 of Page 16.

8 I think the Government is seeking
9 basically, they are essentially trying to cut off a
10 section of Mr. Smith's statement and that is
11 fundamentally unfair to him. It deprives him of his
12 right to due process and right to a jury trial.

13 THE COURT: All right. Anything further
14 on that issue, Mr. Nayback?

15 MR. NAYBACK: No, Your Honor.

16 Thank you.

17 THE COURT: All right.

18 Next.

19 MR. NAYBACK: It is on Page 17, Line 1
20 through Line 14. This is Mr. Smith talking about
21 having some spare bullets, and the United States
22 believes they are exculpatory statements that are
23 inadmissible.

24 Thank you.

25 THE COURT: Mr. Elsenheimer?

1 MR. ELSENHEIMER: Your Honor, my
2 explanation is essentially the same as with regard
3 to Page 16, the first eight lines on Page 16. But
4 just to parse that out a little bit, from my copy
5 and maybe I am wrong on this, but it seems as though
6 the Government is seeking to introduce Lines 9
7 through Line 25 of Page 16 and then it seems to cut
8 off with Line 1 of Page 17. So it is almost like
9 they are -- as if they are kind of severing
10 Detective Abeyta's question almost mid-sentence.

11 I believe that the entire sentence should
12 be introduced and Mr. Smith's, at least Mr. Smith's
13 response, "I didn't see her anymore and I didn't
14 even know that I hit anybody," should be introduced
15 because if we look at -- he is talking about on
16 Page 16, Line 17 through 21 -- I'm sorry, 19, for
17 example -- well, 16 through 22, let's say.

18 It is the discussion of the shooting, so
19 Mr. Smith says, "When I was shooting, no" and
20 Detective Abeyta says, "Okay. And you saw her near
21 the camper and started shooting this way," and he is
22 pointing in a particular direction if you are
23 looking in the video, "and then she took off
24 running."

25 And Mr. Smith says, "Took off for the" --

1 Detective Abeyta says, "In the direction
2 you started shooting?"

3 Mr. Smith clarifies, "toward the road.
4 She was headed out."

5 That is why it is important for us to have
6 the explanation Mr. Smith gives when he says, "I
7 didn't see her anymore and I didn't even know I hit
8 anybody," because it is -- to cut it off where the
9 Government proposes ending that statement leaves it
10 up in the air. It is not the full explanation. It
11 is a conversation between Mr. Smith and
12 Detective Abeyta and if you cut it off where the
13 Government proposes to cut off, you are essentially
14 terminating the conversation before Mr. Smith has
15 had time to even fully answer the question that
16 Detective Abeyta is answering and that is just
17 fundamentally unfair because anybody knows that in
18 the course of a conversation like that, there are
19 questions and answers and additional questions for
20 clarification and an additional answer for
21 clarification.

22 Cutting it off where the Government
23 proposes, deprives the jury of seeing what Mr. Smith
24 actually said to Detective Abeyta and what
25 Detective Abeyta asked Mr. Smith.

1 THE COURT: All right. Thank you.

2 Anything further on this, Mr. Nayback?

3 MR. NAYBACK: Nothing further, Your Honor.

4 Thank you.

5 THE COURT: All right.

6 Next.

7 MR. NAYBACK: Is at the bottom of Page 17,
8 Line 22 through 24. The statement that the
9 United States seeks to exclude is, "When you are
10 scared shitless, you are not really thinking."

11 We think this is part and parcel of the
12 entire defense that Mr. Smith was scared. We think
13 this is self-serving, and exculpatory and wherever
14 it arises in these statements we think it ought to
15 be excluded.

16 Thank you.

17 THE COURT: All right.

18 Mr. Elsenheimer?

19 MR. ELSENHEIMER: Your Honor, my reasoning
20 for this, this is a critical statement. I
21 understand that Your Honor excluded Mr. Smith's
22 statement with regard to his being scared witless
23 regarding the prior -- there had been a prior
24 burglary attempt or a prior intruder on his property
25 and Mr. Smith fired to scare that intruder away and

1 Mr. Smith said in that context that he was scared
2 witless. Your Honor ruled that that should not come
3 in because it wasn't relevant. That may well be the
4 case under a 404B analysis because we are really
5 talking about something different.

6 If we are talking 404B, then Mr. Smith's
7 state of mind at the time isn't necessarily, the
8 Court has perhaps less relevance. When we are
9 talking about this, obviously it has tremendous
10 relevance. So the relevance analysis doesn't,
11 doesn't apply here as it would for the 404B because
12 this is a relevant statement in the context of this
13 type of trial.

14 It is critical under the Rule of
15 Completeness because it is Mr. Smith's -- again, I
16 keep going over this, but it is Mr. Smith's
17 explanation to Detective Abeyta following up on
18 Detective Abeyta's questions about what was taking
19 place at the time Mr. Smith was on his back porch
20 and saw an intruder on his property.

21 It is, I think that without that statement
22 we don't understand why Mr. Smith walked out to get
23 more bullets, why he said what he did in the
24 statements, let's say, Line 6 through 14, I'm sorry,
25 yes, Line 6 through 14, but moreover what the

1 Government is seeking to introduce through Lines 14
2 through 22.

3 For example, Mr. Smith -- this is the part
4 the Government is trying to get in. Mr. Smith says,
5 "Well, so I just said well whatever happens,
6 happens. And I saw the fence line and somebody
7 lying there. There is no rely on this. There is no
8 going back and doing something different."

9 That makes Mr. Smith seem -- the jury
10 could see that and think that Mr. Smith is being
11 crass and what is the word I am looking for, kind of
12 callus about what happened. And he is not at all.
13 He is saying this is kind of resigned, he is -- and
14 he says, "But you're not really thinking."

15 The reason he is saying that is because he
16 was scared, he was scared witless and he wasn't
17 really thinking. It provides critical context for
18 those prior statements. Without that last line,
19 "When you're scared witless you are not really
20 thinking," that prior, the prior essentially seven
21 or eight lines could -- the jury could see that and
22 think that Mr. Smith is callus and that is far from
23 the truth.

24 And that would significantly deprive him
25 of his right to a jury trial and his right to due

1 process by excising that particular statement that
2 he was scared because that provides -- it is
3 critically relevant because this case is all about
4 Mr. Smith's state of mind. And it is critical under
5 the Rule of Completeness because without it, it is
6 like the situation in *Rainey v. Beech Aircraft* and a
7 lot of the other cases that discuss the importance
8 of context with regard to Rule of Completeness.

9 THE COURT: All right. Thank you,
10 Mr. Elsenheimer.

11 Anything further on this particular point,
12 Mr. Nayback?

13 MR. NAYBACK: Just briefly, Your Honor.
14 One of the things that was not highlighted by
15 Mr. Elsenheimer that I wanted to was Mr. Smith's
16 statement contained within Line 1 through 14, which
17 is Line 7 through 9, "I thought I better put some
18 more in just in case I go over and they start
19 shooting at me."

20 Now, I think the Court has already hinted
21 or maybe finally ruled that Mr. Smith wasn't trying
22 to prevent a violent felony. And I think it leaves
23 the jury with the impression that Mr. Smith had some
24 information that this person pointed a gun or was
25 armed.

1 And as the Court, I think knows by now,
2 that the victim was found without any weapon on her,
3 no other shots were fired. And so we think it is,
4 you know, again, Mr. Smith thinking about what he
5 should say to law enforcement and putting in this
6 exculpatory statement about, Oh, what if they start
7 shooting at me I better arm myself with more
8 bullets.

9 So we think that is pretty clearly an
10 exculpatory statement. It is not really taken out
11 of any context of the other statements that he has
12 given.

13 One final point just in response to
14 Mr. Elsenheimer's argument that this is about
15 Mr. Smith's state of mind. As the Court well knows
16 we are not charging him with first-degree murder.
17 This is a reckless homicide. The United States is
18 arguing that his reckless conduct resulted in the
19 death of Jane Doe. And fear is not going, in our
20 minds not going to be a defense to that. In any
21 event, we think that the statement that, "I thought
22 I better put some more in, in case I go over and
23 they start shooting at me."

24 Mr. Smith was asked by agents if he has
25 ever encountered burglars with weapons before, he

1 said no. There is no evidence in this case Jane Doe
2 had a weapon and so we think this is a very clear
3 attempt at Mr. Smith to parse in an exculpatory
4 statement that we think ought not to be admissible.

5 Thank you.

6 THE COURT: Mr. Elsenheimer, any comment?

7 MR. ELSENHEIMER: The only comment I have
8 for that is that I don't think it -- to me in my
9 mind, it doesn't really make sense. I mean,
10 Mr. Smith is merely explaining why he went over and
11 put bullets back into the gun, which I don't think
12 is terribly unreasonable in those circumstances.

13 It is the middle of the night and somebody
14 had just, an intruder had just been on his property.
15 I don't think it is unreasonable and it is certainly
16 not necessarily a self-defense claim, but it is
17 certainly unreasonable that one would go over and
18 reload a gun just in case the intruder who is on
19 one's property returned or still there or was, in
20 fact, armed.

21 We live in a society where guns are
22 relatively prevalent. Probably that is an
23 understatement. Guns are widespread in our society.
24 Virtually, I mean, so many people have guns and a
25 lot of people who shouldn't have guns, have guns.

1 We see it every day. Literally every day we have,
2 the Government charges individuals with possession
3 of firearms and they should not under the law have
4 firearms.

5 We live in a society where guns are as
6 prevalent, practically, or more prevalent as water.

7 And thinking that somebody who is just on
8 one's property, I certainly would probably think
9 that if I was in Mr. Smith's shoes, that they might
10 still be there and they might have a gun. Just, I
11 may not have seen a gun but there is a very real
12 possibility that they could have a gun. It is not
13 unreasonable to go and reload.

14 Now in and of itself -- I am just pointing
15 that out because I think that it does -- Mr. Smith
16 is not a monster because he goes over and reloads
17 his gun. He is certainly not irrational by thinking
18 that somebody might still be on his property with a
19 gun.

20 In the context of this statement it
21 explains why he went to get -- why he put bullets in
22 his clip because the Government is seeking to
23 introduce Lines 14, 15, and 16 and it discusses him
24 going to go put bullets in his clip. Well, the jury
25 is going to hear that he is putting bullets in his

1 clip and it is only fair that they hear why he was
2 putting bullets in his clip. Most jurors are going
3 to be reasonably -- most jurors are homeowners or
4 rent their own homes and realize if they have a gun
5 for self-defense that if they were in Mr. Smith's
6 shoes they would probably go reload, too, just in
7 case that person was still on their property.

8 I don't think it is -- I mean, the jury is
9 going to figure it out, but it is only fair to
10 Mr. Smith to introduce that statement of why he was
11 going over to the truck to reload his gun and why he
12 was reloading. Without that, the statement that he
13 was putting bullets back in the clip is kind of --
14 kind of left, it just doesn't have any, doesn't have
15 anything that explains where it comes from or why it
16 would just suddenly appear out of the blue.

17 THE COURT: All right. Thank you.

18 Anything else on that issue?

19 MR. NAYBACK: No, thank you.

20 THE COURT: Okay. All right.

21 Next.

22 MR. NAYBACK: Your Honor, I think the last
23 two statements in dispute on this interview are on
24 Page 20, Lines 23 and 24.

25 Mr. Smith saying, "I just figured

1 raccoons" and then finally, Your Honor, on Page 39,
2 Line 19 Mr. Smith indicating that fear took over.
3 The United States submits those are both exculpatory
4 statements that ought not to be admissible.

5 And then I will move on to the next
6 interview.

7 THE COURT: Mr. Elsenheimer?

8 MR. ELSENHEIMER: Yes, Your Honor. So
9 with regard to line, Page 18, Lines 9 through
10 Page 19, Line 21, that is the -- that is the
11 beginning of the conversation Mr. Smith is having
12 with Detective Abeyta that the Government is seeking
13 to introduce on Page 19, Line 22. That is a -- that
14 is important because it provides the -- what they
15 are talking about when Detective Abeyta asks
16 Mr. Smith about, "Well, why didn't you shoot into
17 the air," and Mr. Smith explains, "Well, you don't
18 know where it is going to land."

19 It provides an explanation that Mr. Smith
20 didn't know, had just shot to scare the individual
21 off and that that is why he was firing where he did.
22 And that provides the context for Officer Abeyta's
23 question about firing into the air.

24 If I can move over to page -- I have
25 something on Page 20 if I can just look at this

1 really quick.

2 Oh, I know the Government is seeking to
3 introduce paragraph -- Page 20, Line 18 through
4 Line 22. They are seeking to introduce that which
5 includes Detective Abeyta's question, "When you went
6 out twice before what did you see?"

7 They didn't include and maybe this was an
8 oversight, I am not sure, but Mr. Smith's response.
9 I think that is important because without it, it
10 seems as though Mr. Smith didn't answer the question
11 and is therefore being evasive. I think we have to
12 include Mr. Smith's answer to Detective Abeyta's
13 question.

14 MR. NAYBACK: Your Honor, I agree with
15 that. We would concede that that is an oversight on
16 my part.

17 THE COURT: All right.

18 MR. ELSENHEIMER: Again, on Page 22,
19 Line 21, the Government is seeking Line 21 through
20 Page 23, Line 1 but they are seeking to excise the
21 clause, "and went into total absolute scared witless
22 at the time."

23 For the same reasons as I have discussed,
24 that is a critical part of Mr. Smith's answer.

25 Cut editing his response to exclude that

1 is fundamentally unfair and deprives him of his
2 right to a jury trial and his right to due process.

3 THE COURT: One more time. What was the
4 page and line you are referring to?

5 MR. ELSENHEIMER: Sure. It is Page 22 and
6 we are looking at Line 22 and 23.

7 THE COURT: Okay. Got it.

8 MR. ELSENHEIMER: So the Government is
9 seeking to introduce 21 through the next page
10 Line 1.

11 But they are seeking to edit out that
12 statement that I just quoted. Do you want me to say
13 that again?

14 THE COURT: No, I just wondered, I just
15 wanted to know which page and lines you were
16 referring to.

17 MR. ELSENHEIMER: Can I just have a moment
18 because I want to make sure there is not something
19 else that I wanted to address here.

20 THE COURT: Yes.

21 MR. ELSENHEIMER: I just want to make sure
22 that we are clear on this. Page 26, Line 18 through
23 Line 24, we are objecting to that. I can't recall
24 if Your Honor already excluded that, if that was
25 covered, but I just want to make sure that we are

1 objecting to that. That is with regard to a
2 different incident with someone else on Mr. Smith's
3 property.

4 Let me just make the record clear that we
5 are still objecting Page 26, Line 18 through 24 of
6 Document 138-2.

7 Moving on, Your Honor, if I can just
8 address this.

9 THE COURT: Hold on one second.

10 MR. ELSENHEIMER: Sure.

11 THE COURT: All right. What were you
12 going to say, Mr. Elsenheimer?

13 MR. ELSENHEIMER: Your Honor, Page 30,
14 Line 2.

15 THE COURT: All right.

16 MR. ELSENHEIMER: There is the first five
17 words, "I was scared shitless, so."

18 So, again, for the same reasons I have
19 discussed before with this very similar statement.
20 That should be included because it is part of
21 Mr. Smith's answer to Detective Abeyta's questions
22 and his conversation with Detective Abeyta. It
23 should come in under the Rule of Completeness.

24 THE COURT: All right.

25 MR. ELSENHEIMER: I don't know, can I just

1 address Page 38, Lines 5 through 6?

2 I don't believe -- we object to that on
3 the basis it is not relevant. I don't know that the
4 Government is still seeking to get that into
5 evidence, but if they are, we object on the basis
6 that it is not relevant.

7 THE COURT: All right. Are you keeping
8 track of all of these, Mr. Nayback, so you can
9 respond to each?

10 MR. NAYBACK: I am, Your Honor. Thank you
11 so much.

12 I am going to start on Page 26, Line 18
13 through 24. This is something that happened to
14 Mr. Smith and it gives the jury a full impression of
15 the nature of his property and those who he
16 encounters there.

17 And particularly the Government has always
18 sought to admit Lines 18 through 24. And this is a
19 person he encounters and Mr. Smith says, "And then
20 he raises his hands and he says -- what did he
21 say -- 'I am cold. I am only looking for a place to
22 get warm'."

23 We think this is a relevant and admissible
24 statement. It is a statement by the defendant and
25 we think it goes to -- gives the jury a complete

1 picture of how big his property is, how many out
2 trailers he has and that he does encounter people
3 there who are looking for a place to get warm. That
4 is our argument on that.

5 The next, I believe, I will just highlight
6 it for the Court, Page 30, Line 2. Again, he says
7 this throughout his statements that he was scared
8 shitless and we think those are inadmissible.

9 And then finally I am going to go to
10 Page 38, Lines 5 and 6. Those are statements by
11 Mr. Smith that we believe are admissible. He says
12 or a statement, "But I didn't know who this was and
13 I thought, well, it is not Melanie."

14 And we think this is an admissible
15 statement. It goes to show that Mr. Smith did not
16 know who was outside his house, that he had
17 residents at his house, one of which was a small
18 child and we think that is relevant for the jury to
19 hear.

20 Mr. Smith, we allege, was acting
21 recklessly that night shooting into the dark not
22 knowing who was there or what the purpose of that
23 person was there. And each of these statements that
24 Mr. Elsenheimer seeks to keep out goes to show how
25 reckless he actually was.

1 So for those reasons we ask the Court
2 allow the United States to introduce those in its
3 case-in-chief.

4 Thank you.

5 THE COURT: Mr. Elsenheimer, anything
6 else?

7 MR. ELSENHEIMER: Only Page 39. The
8 Government is seeking to introduce a statement at
9 Line 21 through 22. If the Government is seeking to
10 introduce that, Mr. Smith's statement prior to that,
11 that fear took over is part of that statement. It
12 is in response to Detective Abeyta's questions. It
13 is essentially one thought that he is saying, "fear
14 took over and I stopped thinking."

15 And the transcript it looks like it is
16 interspersed with Detective Abeyta essentially kind
17 of in conversation saying, "Uh-huh, uh-huh."

18 This happens a lot in the conversation as
19 it does in most conversations, but it is one thought
20 Mr. Smith saying, "Fear took over and I stopped
21 thinking and just started pulling the trigger."

22 Without "fear took over," that statement
23 is incomplete, inaccurate on its own because it
24 doesn't convey exactly what Mr. Smith said and it
25 unfairly prejudices Mr. Smith in front of the jury.

1 That is all that I have on this particular
2 transcript.

3 THE COURT: All right. Anything else,
4 Mr. Nayback?

5 MS. WILSON: Yes, Your Honor. The
6 United States does seek to admit Mr. Smith's
7 statement that he stopped thinking or -- "And I
8 stopped thinking and I just started pulling the
9 trigger."

10 That goes to the heart of the
11 United States' theory of this homicide, and we think
12 it should be admissible. And I would resubmit the
13 same arguments that Mr. Smith was -- Mr. Smith's
14 exculpatory statements that he was scared witless or
15 that fear took over, are inadmissible.

16 Thank you.

17 THE COURT: Got it, thank you.

18 Moving on, then, Mr. Nayback.

19 MR. NAYBACK: And I'm sorry this is so
20 cumbersome, Your Honor. We don't often have cases
21 where there is a defendant interviewed several
22 times, but I think we are getting very close to the
23 end of this motion.

24 And I am going to start on page, let me
25 make sure here. Page 33 of the May 7th interview by

1 the FBI of Mr. Smith two days after the homicide.

2 And on Page 33, lines, a portion of
3 Line 14 through 17. I am going to read this
4 statement.

5 "And this incident was the guy, I saw a
6 shadow at the back end of the trailer bent down
7 doing something. And I cocked the pistol and went
8 pow."

9 And this is in regards to another
10 statement, you know, and again it is hard to say
11 what a jury might do with a statement where again
12 Mr. Smith is shooting in the dark at a human. But
13 we don't think it is relevant and it is clearly
14 exculpatory and we would ask that lines on this
15 page, Page 33 that Lines 14 starting with, "and"
16 through 17 ending in pow, P-O-W, and then on the
17 same page, Your Honor, Lines 19 through 21, and on
18 21 ending with, "gone" should be excluded as
19 inadmissible.

20 Thank you.

21 MR. ELSENHEIMER: May I have just a
22 moment, Your Honor?

23 THE COURT: You may, yes.

24 MR. ELSENHEIMER: My understanding was the
25 Government was seeking to introduce those

1 statements. At least it is highlighted in green in
2 their, in their Document 132 and I thought green was
3 what they were seeking to introduce.

4 MR. NAYBACK: Your Honor, I apologize. I
5 have as you can probably tell, a number of
6 transcripts in front of me. I was going off
7 Mr. Elsenheimer's transcript here and we are seeking
8 to introduce those statements. I apologize, working
9 with a number of things here. And those statements
10 ought to be admissible and I didn't, I didn't
11 realize that Mr. Elsenheimer was not agreeing to
12 those.

13 Thank you.

14 THE COURT: All right. So the Government
15 intends to admit those statements, the defendant
16 objects.

17 MR. NAYBACK: We think this has already
18 been ruled on by the Court, Your Honor.

19 MR. ELSENHEIMER: Right, I believe it was.

20 THE COURT: I believe it was in the
21 Court's memorandum opinion and order, so then moving
22 on.

23 MR. NAYBACK: Thank you, Your Honor.

24 There weren't many in this transcript that
25 I think were in dispute, and I think that is the sum

1 total. I don't believe -- so on Page 37,
2 Your Honor, Lines 9 and 10, starting on Line 9,
3 "Somebody trying to break in and I just panicked,
4 panicked. I lost any -- again fear took over."

5 And then the same argument applies to
6 Lines 14 through 16. And it's portions of it, "Just
7 scared, scared them off."

8 We think those should be excluded.

9 MR. ELSENHEIMER: Your Honor, may I have
10 just a moment? I want to find a ruling with regard
11 to the last statement.

12 Your Honor, with regard to -- I want to
13 make the argument with regard to Page 37, and I am
14 referring to the statements at Lines 9 through 11
15 and then again Lines 14 through, essentially,
16 Line 16.

17 I think that the Court's reasoning with
18 regard to the statement on Page 33, this is in
19 regard to the 404B evidence and the Government had
20 sought to keep out the statement, "Definitely
21 missing both him and the trailer, just to scare him
22 off."

23 I believe the Court introduced that
24 statement and allowed that statement to come in on
25 the grounds that it provided, there was a danger of

1 misleading the jury by excluding the middle of that
2 passage. I think the same analysis applies to this
3 particular statement on Page 9, I'm sorry, Page 37,
4 Line 9 through 11 and again Page 37, Lines 14 and
5 then Line 15 through 16. I think the same analysis
6 applies that brings in Lines 17 through 18 on
7 Page 33, that the same analysis applies to those
8 disputed portions of Page 37.

9 I hope that makes sense. I am referring
10 to the Court's order with regard to the 404B
11 statement and the same reasoning applies. In fact,
12 I think given the fact that we are talking about the
13 instant case, the case for which Mr. Smith is
14 charged, it is even more danger of misleading and
15 danger of unfair prejudice by misleading the jury
16 with regard to these statements on Page 37.

17 THE COURT: Yes, I follow your argument.
18 Anything further, Mr. Nayback?

19 MR. NAYBACK: No. Thank you, Your Honor.

20 THE COURT: Any others in this transcript,
21 Mr. Nayback?

22 MR. NAYBACK: Yes. We are almost done, at
23 least from our perspective.

24 On Page 55 Special Agent Cobb is asking
25 Mr. Smith at Line 7, "What was the feeling inside

1 you? I know you were scared but what was the
2 purpose of shooting the gun?"

3 And on Line 10 Mr. Smith indicates, "to
4 scare them away," and we believe this is
5 inadmissible being an exculpatory statement.

6 THE COURT: Mr. Elsenheimer?

7 MR. ELSENHEIMER: I believe that it's
8 prior conversations introduced. Prior conversations
9 being my understanding the Government is seeking
10 essentially virtually the entire conversation
11 beginning on Page 53, Line 11, going all the way
12 through to Page 55 Line 6.

13 My understanding from my transcript is
14 that that is what the Government is seeking to
15 introduce. I think that the Rule of Completeness
16 demands that that, at the very least, Special
17 Agent Cobb's question of Mr. Smith, "What was the
18 feeling inside of you? I know you were scared, but
19 what was the purpose of shooting the gun?"

20 That, the Rule of Completeness demands
21 that that, those four lines be introduced as well,
22 Line 7 through 10 of Page 55 because it is an entire
23 conversation about what Mr. Smith was doing, where
24 he was, what was happening and a discussion about
25 the use of a firearm. And I think that statement

1 has to be introduced if the prior conversation is
2 introduced.

3 THE COURT: All right. Understood.

4 Mr. Nayback?

5 MR. NAYBACK: The last final couple,
6 Your Honor, is on Page 38 and 39. The first one the
7 Government seeks to exclude is Line 2 of Page 38,
8 which is in the middle of the line and it just says,
9 "I was too nervous."

10 We think that is exculpatory and
11 inadmissible.

12 And then secondly, Your Honor --

13 THE COURT: Hold on. Page 38 line?

14 MR. NAYBACK: Two.

15 THE COURT: Line 2, okay.

16 MR. NAYBACK: And then on Page 39, the
17 next page, 19 through 24. Mr. Smith indicates on
18 Line 19 starting with, "And when this person bent
19 down I thought I was going to get shot right there
20 on the spot. Total panic. Fear just took over."

21 We believe that is an exculpatory
22 statement that should be excluded.

23 And then similarly that same paragraph
24 Line 23 and 24, "And then after that I was scared.
25 I couldn't say."

1 That those should be excluded, Your Honor.
2 And I have one final one on the next page.

3 THE COURT: Mr. Elsenheimer?

4 MR. ELSENHEIMER: With regards to Page 38
5 taking those four words out at Line 2, "I was too
6 nervous," I think that has to come in under the Rule
7 of Completeness.

8 Moving on to Page 39, again what the
9 Government is doing is kind of piecemeal parsing out
10 and cutting and pasting Mr. Smith's statements to
11 kind of take away the full -- the full body of what
12 he is explaining to the detectives.

13 The Government wants to introduce
14 statements that Mr. Smith made to the detectives.
15 They have to introduce at least the portions of that
16 statement that don't mischaracterize what Mr. Smith
17 said. Taking these lines out, so Page 39, Line 19
18 through 21 and again Line 23 through 24, risk --
19 doesn't just risk, it would lead to a
20 mischaracterization of what Mr. Smith said, and that
21 is fundamentally unfair. And it will mislead the
22 jury.

23 I believe that Mr. Nayback didn't move on
24 to Page 40; is that right?

25 MR. NAYBACK: That is correct.

1 THE COURT: He has not yet moved on to
2 Page 40.

3 MR. ELSENHEIMER: I wanted to make sure.

4 THE COURT: Let me just ask Mr. Nayback,
5 anything on 38, Pages 38 or 39?

6 MR. NAYBACK: I think the argument on 38
7 is the same one we have maintained throughout this
8 morning, Your Honor.

9 And then in particular on Page 39 we do
10 think that the defense is trying to get into an area
11 that the Court believes, indicated in their pretrial
12 ruling that was inadmissible. So what you see is
13 Mr. Smith on Page 39, again this is after he has had
14 two days to think about what his statement should be
15 like, that, "When this person bent down, I thought I
16 was going to get shot right there on the spot.
17 Total panic fear just took over."

18 Again, Jane Doe was not found with a
19 weapon. There is nothing to corroborate that she
20 bent down except to maybe get out of the way of
21 Mr. Smith's gunshots, and we think this is
22 exculpatory and ought not to be admissible. The
23 Government ought not to be forced to introduce it.
24 And for those reasons we would ask that the Court
25 not allow defense to get into that with

1 cross-examining the witness. We certainly don't
2 intend to introduce it.

3 THE COURT: Anything else on Page 39
4 before we move on to Mr. Nayback's comment on
5 Page 40?

6 MR. ELSENHEIMER: Not at this time,
7 Your Honor.

8 THE COURT: Mr. Nayback.

9 MR. NAYBACK: Again, the same arguments,
10 Your Honor, apply on Page 40 to Line 7 and 8,
11 particularly after the first shot which is behind
12 the, "I just went, I went total fear," and then the
13 exculpatory at Lines 11 and 13. "I thought whoever
14 it was had already run off so I was just shooting to
15 make sure they were scared."

16 I missed just a couple of others,
17 Your Honor, I promise will just be brief. I am sure
18 Mr. Elsenheimer will take them up with you.

19 Page 45 of this same statement, Lines 3
20 through 5 you have Special Agent Michelle Cobb
21 asking the defendant, "During all of these incidents
22 did anyone ever have a weapon?"

23 MR. SMITH: "Not that I know of."

24 That is, should be an admissible statement
25 and I think that defense is objecting to it.

1 I will move on unless you are going to
2 hear from Mr. Elsenheimer.

3 THE COURT: Let me hear from
4 Mr. Elsenheimer on this.

5 MR. ELSENHEIMER: On Page 40, I believe
6 the same analysis under the Rule of Completeness
7 demands that those statements, Page 40, Lines 7 and
8 8 and then again Lines 11 through 13 should come
9 into evidence.

10 Under the Rule of Completeness, "What was
11 the person doing?"

12 "Running."

13 And then it just stops there the jury is
14 left with a misapprehension of what actually
15 happened or what Mr. Smith was describing as
16 happening. What he really said was, "Running. I
17 thought whoever it was had already run off so I was
18 just shooting to make sure they were scared."

19 Leaving it with just "running" could give
20 the implication, the inaccurate implication
21 Mr. Smith was following them as he was firing or
22 something like that. I mean, the jury could be left
23 with a misunderstanding of what happened.

24 What Mr. Smith said was, "I thought
25 whoever it was already ran off, so I was just

1 shooting to make sure that they were scared."

2 That has to come in under the Rule of
3 Completeness particularly considering what the
4 Government is proposing to introduce is essentially
5 a very large swath of Mr. Smith's conversation with
6 the FBI.

7 With regard to Page 45, I believe the
8 Government is just trying to introduce Line 3
9 through Line 5. I don't think they are trying to
10 introduce anything else. And our highlighting of
11 that is to point out this: The Government wants to
12 get in the fact that Mr. Smith never saw anyone,
13 never -- not that he, he did not know of anybody on
14 his property who had a weapon.

15 Now, of course the person with the 404B
16 incident from a month or so prior may have had a
17 weapon, we don't know. What the Government is
18 trying to do and it shows the unfairness. As I
19 explained in the margin, it shows the fundamental
20 unfairness of parsing Mr. Smith's prior statements
21 that we have been discussing. Statements on
22 Page 40, statements on Page 39, 38, that he was
23 nervous, that the person bent down.

24 Mr. Smith never saw a weapon but again
25 that doesn't mean, merely the absence of evidence,

1 the absence of something doesn't mean that somebody
2 doesn't have a weapon. The absence of seeing
3 somebody with a gun doesn't mean they don't have a
4 gun. That still could give rise in the middle of
5 the night in the backyard of one's house with an
6 intruder, that still is a scary frightening
7 situation.

8 The Government wants to get in the
9 statement that Mr. Smith, "did anyone ever have a
10 weapon?"

11 "Not that I know of."

12 On its own the Government would love to
13 have that statement and not size out these other
14 statements. The fact that the Government wants to
15 see, get that statement in highlights the unfairness
16 of excluding these other statements that we believe
17 should be introduced under the Rule of Completeness.

18 What the Government is doing is
19 essentially cutting and pasting Mr. Smith's
20 statements to paint as negative a picture as
21 possible and as -- to the jury of Mr. Smith's
22 statements. That will lead to, it's fundamentally
23 unfair to Mr. Smith. It misleads the jury about
24 what Mr. Smith actually said and I think that the
25 Government's effort to introduce Lines 3 through 5

1 on Page 45 highlight that because that just -- it
2 will leave the jury with a misapprehension, a
3 misunderstanding and a prejudicial misunderstanding
4 about what Mr. Smith said in response to the full
5 questioning with the FBI.

6 THE COURT: All right.

7 Anything else, Mr. Nayback?

8 MR. NAYBACK: Thank you, Your Honor. We
9 are simply trying to operate within the rules here,
10 Your Honor, and that was Mr. Smith's statements that
11 he doesn't know if anyone else ever had a weapon.
12 And then on page, I think this will take care of
13 most of the arguments altogether.

14 On Page 48 we again have the same
15 statement by Mr. Smith that he was -- this is at
16 Lines 6 and 7, Your Honor. "I was just shooting to
17 make sure they were as afraid of being there as I
18 was."

19 And we don't believe that is -- we believe
20 that is an exculpatory statement that could be
21 excluded.

22 And then if I can, just the last one is on
23 Page 49, Your Honor. And this is a dialogue on
24 Lines 7 through 13. It says -- Special Agent Cobb
25 is talking with Mr. Smith along with FBI Special

1 Agent Taylor. "I struggle with stick figures. So,
2 I mean, that is totally okay. We are not DaVincian
3 here, just something rough if you label them. All
4 right."

5 And she is cut off, but Special Agent Cobb
6 says, "The idea," and the defense, we don't have a
7 real, a real problem with these, Your Honor. I
8 think this goes to Mr. Smith's drawing of his
9 property and we intend to introduce it. And I think
10 I -- I think I read it here that Mr. Smith's drawing
11 was not to scale and we honestly don't have a
12 problem with that.

13 Once the Court sees the exhibit you will
14 see what I am saying. It is a very rough sketch,
15 but the United States thinks it is relevant,
16 admissible.

17 If Mr. Elsenheimer wants to -- and we will
18 probably have the Agent obviously admit that it is
19 not to scale. I think that would be the essence of
20 the argument by Mr. Elsenheimer. We will concede
21 that. It is pretty clear from the sketch itself.

22 And I think, Your Honor, sorry about how
23 laborious this has been this morning, but I think
24 that concludes the United States and perhaps the
25 defense arguments on these transcripts.

1 MR. ELSENHEIMER: Your Honor, just very
2 briefly, if I may.

3 THE COURT: Sure.

4 MR. ELSENHEIMER: Page 48. I don't have
5 anything to add, really, aside from what is in the
6 margin, which is that it provides a full answer to
7 Agent Cobb's question and I believe under the Rule
8 of Completeness it has to be introduced.

9 Because it doesn't, without that it seems
10 as though Mr. Smith isn't fully answering the
11 question and it could lead this jury to think that
12 he is not, by not answering the question affirming
13 the contrary and I think that is, could unfairly
14 mislead the jury.

15 With regard to Page 55, I'm sorry,
16 Page 49, I appreciate Mr. Nayback's concession on
17 that, with regard to the drawing. I think it is
18 fair to bring in the statement if the drawing is
19 introduced because it provides an explanation of
20 that.

21 The last issue, I believe is Page 55 and
22 my only comment on that is that it completes the
23 questioning that Agent Cobb has been going through
24 for the prior, essentially from Page 53, Line 11 it
25 goes all the way through, the Government is seeking

1 to introduce it through Page 55, Line 6. The next
2 four lines complete that.

3 And now, there is even more kind of
4 discussion of that but I think, you know, for
5 purposes of not having, not taking up the entire
6 trial with recordings and transcripts, but I don't
7 think the rest needs to be introduced. I don't have
8 any problem if it is, but certainly the four lines
9 on Page 55, 7, 8, 9, and 10 have to be introduced to
10 finish that conversation.

11 THE COURT: Okay. Thank you.

12 Anything else?

13 MR. ELSENHEIMER: No, I don't think so,
14 Your Honor.

15 THE COURT: So there were a few things
16 that I just wanted to ask you to clarify. So this
17 same transcript, Defendant's Exhibit C, on Page 4,
18 Lines 16 to 21, there was a defense objection but I
19 wasn't sure that I have seen the Government's
20 response to this.

21 MR. NAYBACK: Your Honor, just so I am
22 clear, are we talking about going over Mr. Smith's
23 rights?

24 THE COURT: So the defense objected to
25 Lines 16 through 21 on Page 4.

1 MR. ELSENHEIMER: I'm sorry, I missed
2 that, Your Honor.

3 THE COURT: And I didn't see, I didn't
4 hear any or see anything from the Government on that
5 objection.

6 MR. NAYBACK: We don't intend to introduce
7 those, Your Honor.

8 THE COURT: Okay. All right. And then I
9 have a similar question then on Page 10, Lines 1
10 through 4. And again the defendant was seeking to
11 admit the full answer and I didn't see any position
12 from the Government on that.

13 MR. NAYBACK: Your Honor, I'm sorry to
14 interrupt. And this has been a little scattered
15 this morning. I was -- you heard me say that it was
16 going over his rights. I think Mr. Elsenheimer was
17 referring to a Government's Exhibit C and I was
18 looking at another one.

19 What I hear, what the Court asked about
20 was FBI Taylor saying, "All right. Well, I'm
21 Special Agent Travis Taylor. You know the FBI isn't
22 here because you're in bigger trouble, it is just
23 because it was on Pueblo land so that is our
24 jurisdiction. I don't want to think that," and then
25 there is something inaudible.

1 And if I heard the Court right, am I at
2 the place where the Court was at?

3 THE COURT: Yeah. That was my first
4 question. The defendant had objected to that
5 portion that you just read and I had not seen the
6 Government's response to the defendant's objection.

7 MR. NAYBACK: I apologize, Your Honor.
8 This is basically a statement by the FBI explaining
9 why there is jurisdiction there and I think that is
10 a fair game for the jury to hear. It is probably
11 going to come out in the Court's voir dire. We will
12 probably have the Court explain why they are in
13 Federal Court over a homicide. So we think it is,
14 we think it is admissible.

15 I'm sorry, I don't have the defense
16 objection in front of me. I see it now,
17 Mr. Elsenheimer, I apologize.

18 I just disagree, Your Honor, that this is
19 a legal conclusion. I think the jury is going to
20 understand that Indian Country status is an element
21 of the offense. It is just the FBI explaining why
22 it is there. We don't want the jury to think that
23 Mr. Smith is in bigger trouble than he already is,
24 but we think this statement is admissible. And
25 thanks for highlighting that for me. Sorry I was on

1 the wrong spot.

2 THE COURT: All right. Do you have any
3 further comment on that particular objection,
4 Mr. Elsenheimer?

5 MR. ELSENHEIMER: I am sure that is going
6 to be part of the Government's case-in-chief. I
7 just don't think that it can come in through a
8 transcript and something that Agent Taylor said to
9 Mr. Smith in the context of an interview. It
10 strikes me as lacking foundation and having most
11 likely hearsay problems.

12 I don't know that we can assess the
13 hearsay problems given the cursory nature of the
14 statement, but I am sure it will draw from hearsay.
15 It is probably going to have hearsay problems but
16 certainly has foundational problems if it comes in
17 through this. Obviously there are other ways the
18 Government can establish that. I am not arguing
19 they can't make jurisdiction part of their
20 case-in-chief.

21 THE COURT: All right. Understood.

22 MR. ELSENHEIMER: I would argue that, but
23 I don't think I can in this context.

24 THE COURT: Yeah, we are just talking
25 about this statement in the transcript.

1 All right. Understood. And then,
2 Mr. Nayback, I had a similar question about Page 10
3 of the same transcript, Lines 1 through 4 that the
4 defendant seeks to admit and I wasn't sure that I
5 have the Government's position on that. So Page 10,
6 Lines 1 through 4.

7 MR. NAYBACK: We have no objection that
8 that might be admissible, Your Honor. Whether we
9 intend to introduce it or not, I think it is within
10 the United States' prerogative and we sought to get
11 it introduced, but we are excluding before that, "I
12 just work for her just for a place to stay."

13 I think it is probably going to be part of
14 Mr. Smith's story anyway, and there is no real fight
15 over that.

16 Thank you.

17 THE COURT: Mr. Elsenheimer, any comment?

18 MR. ELSENHEIMER: Just what we have in the
19 margins. I think that the full answer should be
20 given because without anything less than the full
21 answer could leave the jury with the impression that
22 Mr. Smith was not being fully -- fully answering the
23 question or somehow being evasive because the
24 question was, "How long have you been managing?"

25 THE COURT: Right.

1 Then there were a couple of things that I
2 wanted the defendant to clarify. So the Court made
3 some rulings regarding the "motel cop" reference and
4 things of that nature.

5 So the Court excluded some of that and in
6 this transcript the defendant highlighted those
7 portions in green, which I guess indicated that the
8 defendant was -- well, I wanted to get the
9 defendant's position clear on the record because it
10 looked like this was material that has already been
11 ruled on. So does the defendant continue to object
12 or what, can you just explain that for me, please.

13 MR. ELSENHEIMER: Absolutely, Your Honor.
14 I apologize, the highlighting that we had in there
15 was inaccurate. I don't know if it was a coding or
16 if we highlighted it in yellow and it turned into a
17 darker green, I'm not sure.

18 You're absolutely right, Your Honor, and
19 this is with regard to Pages 16 and 17 of your
20 memorandum opinion and order. You identified three
21 areas, first Item 4, Item 5, and Item 6. And you're
22 absolutely correct that in each of those we did
23 object to those and we continue, we persist in our
24 objection to those. I apologize for the confusion
25 in our highlighting and in our response.

1 THE COURT: All right. And then that
2 carries over on to Page 21, Page 22, Page 23. I
3 just wanted to make sure that the defendant
4 continues to object to the admission of those
5 references.

6 MR. ELSENHEIMER: That is right. So
7 Page 21 would be Item 5. That is the issue of
8 confronting hotel residents in the past. Your Honor
9 excluded that and we continue to object to that.

10 With regard to Item 6, this is in Page 22,
11 in regards to the incidents where Mr. Smith took a
12 pistol when he perceived a threat, we continue in
13 our objections to that.

14 THE COURT: All right. Well, you answered
15 my question, then.

16 Are we done, then, with the transcripts?

17 MR. NAYBACK: I am hoping so, Your Honor.
18 I am.

19 MR. ELSENHEIMER: I am as well.

20 THE COURT: All right. So then the 911
21 call, is that what is next?

22 MR. NAYBACK: Your Honor, Ms. Wilson is
23 going to handle that.

24 Thank you.

25 MS. WILSON: Good morning, Your Honor.

1 Good morning.

2 THE COURT: Good morning. I am ready when
3 you are.

4 MS. WILSON: Thank you.

5 Well, with regard to the 911 calls, I know
6 they were not in the exhibit binder for the Court,
7 so I realize the Court does not have a copy of
8 those. And I believe when we filed our exhibits in
9 September of 2020, we sought to be over inclusive
10 and we did file in our exhibit list and in our
11 witness list the 911 operator as a potential witness
12 and included the transcripts from those.

13 We at that time were not sure if we were
14 going to play them and we thought to be over
15 inclusive. As we are reviewing things, we want to
16 streamline the evidence in the presentation for the
17 jury, we are inclined not to play them. I just
18 wanted to let the Court know that.

19 With regard to any questions the Court may
20 have, specifically I do have the transcript in front
21 of me. I know you don't. There are a few
22 statements that relate to break-ins and, of course,
23 the United States would move that those are
24 exculpatory statements and that they should be
25 excluded.

1 And then there is a lot of chatter after
2 the call is made. There is a lot of chatter between
3 unknown witnesses who are talking over each other.
4 The type of thing you would expect in a 911 call.
5 Somebody is just repeating the information they just
6 heard just so that the EMTs and law enforcement can
7 respond accordingly.

8 So that would all be hearsay. We would
9 believe that would be excluded, them talking to each
10 other saying what they just heard. But, again, from
11 our perspective, we are inclined not to admit these
12 statements or the transcripts.

13 Any questions, Your Honor?

14 THE COURT: Not at the moment.

15 Mr. Elsenheimer, do you have any comment?

16 MR. ELSENHIMER: May I have just a
17 moment, Your Honor?

18 THE COURT: Yes.

19 (A recess was taken.)

20 THE COURT: All right. We are back on the
21 record in USA versus Smith. And when we broke I was
22 about to hear from Mr. Elsenheimer.

23 MR. ELSENHIMER: Your Honor, I don't know
24 if you have the 911 transcript in front of you, but
25 we can share the screen.

1 Before I do so, let me just say that I
2 agree that there is a lot of chatter in the 911 call
3 that I agree shouldn't come in. It doesn't fall
4 within any exception.

5 Mr. Smith makes a basic call to 911 and
6 that begins on Page 2 and here is where I will share
7 the screen, if that helps. So if we begin at
8 Page 2. So the 911 call essentially begins at the
9 beginning of this page and it carries on through to
10 Page 4, I'm sorry, 3, Line 23.

11 I agree with Ms. Wilson that what comes
12 after that I believe it was after Mr. Smith hangs
13 up, then there is a lot of discussion between the
14 dispatch and perhaps other police officers. I agree
15 that doesn't come in, but Mr. Smith's statement, we
16 believe, is an excited utterance and falls within
17 the excited utterance exception to the hearsay rule.
18 It is made virtually immediately after the incident
19 he calls 911 and describes where he is, what
20 happened.

21 And we believe it should, the defense
22 should be allowed to introduce this in trial in our
23 case-in-chief. I think it sits within the hearsay,
24 I think the one question Your Honor has is whether
25 or not that you had sufficient evidence to consider

1 this or sufficient record to decide whether it fell
2 within excited utterance exception. It seems to
3 me that the first and third prongs of the analysis
4 are set aside. There is a startling event and a
5 nexus.

6 The one question it seems as though was
7 open was whether or not the statement was made while
8 the declarant was under the stress of the event's
9 excitement. We would be glad to play the 911 call
10 for you if you would like, Your Honor. I think that
11 would be the best record to clarify Mr. Smith's
12 operating under the stress of an -- of the event.

13 THE COURT: I think that would be helpful
14 for the Court.

15 MR. ELSENHEIMER: We would be glad to do
16 so. We will play that right now and I will also be
17 glad to send that to Your Honor through whatever way
18 you would like me to. And I can talk to Ms. Romero
19 about that.

20 We will play it right now and then we can
21 send you a copy as well so you have it.

22 THE COURT: All right. Is there anything
23 about the call that gives me a time frame how close
24 in time the 911 call was to the event?

25 MR. ELSENHEIMER: I don't believe so, Your

1 Honor. I mean, there is Mr. Smith's statement.

2 THE COURT: I am ready when you are.

3 MR. ELSENHEIMER: Thank you, Your Honor.

4 We are going to play one snippet of it to
5 make sure you can you hear it.

6 Can you hear that?

7 THE COURT: I heard that, yes.

8 MR. ELSENHEIMER: All right. We will play
9 the rest of it.

10 (Whereupon a portion of a 911 audio was
11 played.)

12 MR. ELSENHEIMER: We just stopped it
13 briefly, Your Honor.

14 (Whereupon a portion of a 911 audio was
15 played.)

16 MR. ELSENHEIMER: Your Honor, that would
17 be the extent of what we would want to introduce. I
18 also want to point out that there is a part of that
19 recording, and it would be lines -- it would be
20 Page 2, Lines 12 through 19, which is where the
21 dispatcher -- we are going to pull it up for you.
22 Lines 12 through 18 where the male was identified as
23 the male dispatcher is characterizing for someone
24 else what happened. I don't think I can make a
25 plausible argument that that should come in, because

1 it is a dispatcher relating it to somebody else of
2 what he was told. I don't think that falls within
3 the excited utterance exception, but the rest of it,
4 I believe, does fall within the excited utterance
5 exception.

6 THE COURT: All right. Now, I believe you
7 said you would try to get, get the audio recording
8 available to the Court; is that right?

9 MR. ELSENHEIMER: Certainly, Your Honor.
10 I will speak with Ms. Romero, your CRD, about that.
11 Whatever form is best for us to send it to you
12 whether it is on a DVD or electronically or --

13 THE COURT: Right. Then if you could also
14 send me the portions of the transcript that
15 correspond to what you want admitted, that would be
16 helpful, too.

17 MR. ELSENHEIMER: Certainly, Your Honor.

18 THE COURT: Okay.

19 So, Ms. Wilson?

20 MS. WILSON: Yes, Your Honor. In response
21 to that, I would just like to point out for the
22 record that Mr. Smith did not call 911 on his own
23 volition.

24 At this point, as you can recall from his
25 statement Ercilia had come out of her home because

1 she had heard the gunshot. So she comes out, she
2 sees a body laying there she says, "Oh, no, Doug,
3 you need to call 911. You need to call for help."

4 To the point that this may have happened
5 in, you know, the amount of time the call made
6 shortly after the event, the United States still
7 believes that his statement in -- you will see it
8 when you look at the transcript. His first
9 statement, "Oh, there was somebody breaking into the
10 building back here," is still exculpatory. It is
11 self-serving. It is something he says after he has
12 been caught over a dead body with a gun.

13 It is important to note that he says
14 "Somebody is breaking into the building back here."

15 He says building. There is nothing in the
16 evidence to show that there is a building that was
17 being broken into. There is the trailer, which is
18 at issue, he doesn't say trailer. So that is
19 misleading. It has potential to mislead the jury.
20 That is of a concern to the United States as well.

21 The fact that he also says, "We have had a
22 lot of break-ins," Your Honor has heard why we
23 believe that that is also a self-serving statement,
24 something that he is saying after the fact. He is
25 talking to the authorities here, so of course he has

1 an incentive to mitigate some of the damage he has
2 already done. If somebody has seen him with the
3 body, so of course he has got to call 911. And of
4 course he has to make these statements.

5 So for those reasons if the transcript
6 does come in through the defense, the United States
7 believes that we can streamline our presentation of
8 the evidence, we can talk about this in summary, but
9 if it does come in, we would argue that those two
10 statements are inadmissible and that they should be
11 excluded.

12 THE COURT: Anything further?

13 MR. ELSENHEIMER: Your Honor, I don't
14 think that we can characterize Mr. Smith's statement
15 to 911 as misleading. I am not sure what else he
16 should have said in that moment.

17 It is what he saw happening. There was
18 somebody breaking into a building in the back. It
19 was the exact description, it was a motor home, but
20 it is a building. It is a structure. That's what
21 we call it. That's how we describe things.
22 Somebody was breaking into a building on his
23 property. It is not misleading. There's nothing
24 misleading about his statement. It's exactly what
25 happened.

1 It also provides an explanation for the
2 jury for why he did what he did. He placed the gun
3 down on the ground and when the police officers
4 arrived that is where they found the gun. The
5 reason he did that is because that is what he was
6 instructed to do by 911. He did exactly what he
7 should have done. He called 911 after this
8 happened, explained what happened and did as they
9 told him to do.

10 I don't think that anything about it is
11 misleading or mischaracterizes what happened. It is
12 certainly not misleading.

13 One other thing. Your Honor had a
14 question about how -- if we know or, if we have
15 anything that tells us how close in time the 911
16 call was made after the incident, after Mr. Smith
17 fired his gun.

18 And I think the Government clarified that.
19 Ms. Trujillo came out on her back porch, saw
20 Mr. Smith there and he told her what happened and
21 she said, "Doug, you have got to call 911."

22 He said that -- and that is what he did.
23 I think that is the best evidence we have that this
24 is in almost immediate propinquity to the event that
25 we are talking about here. This was, I mean within

1 seconds after Mr. Smith walked out, went to his
2 truck and then walked to the front of his property
3 and saw the decedent lying on the ground and then
4 Ms. Trujillo came out of her house, immediately
5 after that, that he called 911.

6 THE COURT: Okay. Anybody have any other
7 comment on the 911 call, any other?

8 MR. ELSENHEIMER: No, Your Honor.

9 MS. WILSON: No, Your Honor.

10 THE COURT: Thank you.

11 Does anybody have anything else they need
12 to take up?

13 MR. ELSENHEIMER: I don't believe so,
14 Your Honor.

15 MS. WILSON: I think just for
16 clarification, the United States' practice in the
17 past and as Mr. Nayback was talking about, if the
18 United States elects to admit certain statements
19 that the defendant makes, either through the Agent
20 or through the transcript and playing of the
21 recording, we will make copies of those available
22 prior to trial.

23 We will file an amended exhibit list and
24 witness list so everyone will have a copy of the
25 recording and the transcripts so we know what to

1 expect. And we hope not to be redundant in our
2 presentation.

3 So we appreciate the Court giving us the
4 parameters of what defendant's statements we can go
5 into and then from there will elect to make
6 presentation as streamlined as possible.

7 And the only other logistical issue we
8 have since we do have a number of witnesses and
9 experts that we have to sort of look into, just
10 scheduling perhaps.

11 THE COURT: Well, what I would like to do
12 is get you a ruling on these issues and then we can
13 probably schedule a status conference or something
14 like that to try to pin down some scheduling issues.
15 So I will get a ruling out to you on today's
16 matters, and then we will proceed from there.

17 MS. WILSON: Thank you, Your Honor.

18 MR. ELSENHIMER: Thank you, Your Honor.

19 THE COURT: Thank you all for your
20 presentations today. That concludes this matter and
21 we will stand in recess. I will take the matter
22 under advisement and get you a ruling as soon as
23 possible.

24 Thank you.

25 (Proceedings concluded at 11:08 a.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: March 16, 2021

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